

LAW OFFICE  
**THOMAS F. MCFARLAND, P.C.**  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
*mcfarland@aol.com*

THOMAS F. MCFARLAND

August 15, 2007

By e-filing

Vernon A. Williams, Secretary  
Surface Transportation Board  
395 I. Street, S.W., Suite 1149  
Washington, DC 20024

Re Finance Docket No. 34870 *PYCO Industries, Inc. v. South Plains Switching, Ltd Co*

Finance Docket No. 34889. *PYCO Industries, Inc. -- Alternative Rail Service -- South Plains Switching Ltd Co*

Dear Mr. Williams

Herby transmitted is a Reply In Opposition To "Emergency Motion To Prevent Further Retaliatory Actions By South Plains Switching, Ltd Co. Against PYCO Industries, Inc.", for filing with the Board in the above referenced matters

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for South Plains  
Switching, Ltd Co*

*1561-kt-enc-30891254-epilestn2*

220049

220050

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

PYCO INDUSTRIES, INC. v. SOUTH	)	FINANCE DOCKET
PLAINS SWITCHING, LTD. CO.	)	NO 34870
	)	
PYCO INDUSTRIES, INC. --	)	FINANCE DOCKET
ALTERNATIVE RAIL SERVICE --	)	NO 34889
SOUTH PLAINS SWITCHING LTD	)	

---

**REPLY IN OPPOSITION TO "EMERGENCY MOTION  
TO PREVENT FURTHER RETALIATORY ACTIONS  
BY SOUTH PLAINS SWITCHING, LTD. CO.  
AGAINST PYCO INDUSTRIES, INC."**

---

SOUTH PLAINS SWITCHING, LTD. CO.  
P O Box 64299  
Lubbock, TX 79464-4299

*Replicant*

THOMAS F McFARLAND  
THOMAS F McFARLAND, P C  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204  
(312) 201-9695 fax  
mcfarland@aol.com

*Attorney for Replicant*

DUE DATE. August 15, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

PYCO INDUSTRIES, INC. v SOUTH	)	FINANCE DOCKET
PLAINS SWITCHING, LTD. CO.	)	NO. 34870
	)	
PYCO INDUSTRIES, INC. --	)	FINANCE DOCKET
ALTERNATIVE RAIL SERVICE --	)	NO. 34889
SOUTH PLAINS SWITCHING LTD.	)	

---

**REPLY IN OPPOSITION TO "EMERGENCY MOTION  
TO PREVENT FURTHER RETALIATORY ACTIONS  
BY SOUTH PLAINS SWITCHING, LTD. CO.  
AGAINST PYCO INDUSTRIES, INC."**

---

Pursuant to the Board's decision served August 10, 2007, SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to an "Emergency Motion to Prevent Further Retaliatory Actions by South Plains Switching, Ltd. Co. Against PYCO Industries, Inc." (Motion) filed by PYCO Industries, Inc. (PYCO) on August 1, 2007.

**FOREWORD**

SAW shows first that there is no legal justification for the Motion. SAW refers to an Injunction issued by Presiding Judge Sam Medina of the 237<sup>th</sup> District Court of Lubbock County, Texas, on October 3, 2006 that enjoins PYCO from crossing SAW's wye track until further order of that Court (State Court Injunction). Appendix 1 attached to this Reply is a copy of that State Court Injunction.

Appendix 2 attached to this Reply is the Verified Statement of Larry D. Wisener, President of SAW, which shows that there is no factual justification for the Motion either. Mr.

Larry Wisener's Statement also responds to numerous inaccurate and misleading statements in PYCO's Motion and in the verified statement of Robert Lacy attached to that Motion.

Appendix 3 attached to this Reply is the Verified Statement of Shad Wisener, a member of SAW's train crew. Mr. Shad Wisener's Statement rebuts PYCO contentions about an incident that recently occurred at and near the crossing.

**I. THERE IS NO LEGAL JUSTIFICATION FOR THE MOTION**

The State Court Injunction is controlling in regard to PYCO's legal inability to cross SAW's wye track (See Appendix 1 attached). That Injunction bars PYCO from crossing SAW's wye track until further order of the Court. The Court has not vacated nor dissolved the State Court Injunction. It follows that PYCO continues to be prohibited from crossing SAW's wye track.

PYCO has requested the Board "to bar SAW and Choo Choo from any form of interference with PYCO's use of the wye crossing during WTL protocol hours" (Motion at 10, emphasis in original). It is clear that the Board cannot grant that relief without running afoul of the State Court Injunction. The Board does not have authority to set aside or to disregard a valid order of a State Court.

In essence, the Motion is a request for a declaratory order or advisory opinion that PYCO has the right to cross the wye track. PYCO would present such an order or opinion to the Texas State Court as purported justification for dissolution of the State Court Injunction.

The Board should decline to issue such an order or opinion. The Board recently refused to do so in *Mid-America Locomotive and Car Repair, Inc. -- Petition for Declaratory Order*,

2005 STB LEXIS 233 (Finance Docket No. 34599, decision served June 6, 2005), in

circumstances similar to those in the present case. The Board there said (at \*10-11)

... At bottom, Mid-America is seeking a determination from the Superior Court that it has a right under state property law to continue using an access road that has been used for more than 30 years as the only means to access the now land-locked rail car repair facilities at Harwood Yard. Given these circumstances, it is reasonable for the Superior Court to interpret any state or local property interests applicable to this property and to resolve the parties' dispute in the first instance.

PYCO has not produced documentation that would support its legal right to a private crossing over SAW's wye track. As the Board recognized in the *Mid-America Locomotive* case, *supra*, it is the State Court in the first instance that should determine whether or not, in the absence of a written agreement to cross, PYCO has a right to cross SAW's tracks under Texas law. Consequently, the Board should not interfere with the Texas Court's determination of that issue.

Based on the foregoing, the Motion should be denied as legally unjustified.<sup>1</sup>

## **II. THERE IS NO FACTUAL JUSTIFICATION FOR THE MOTION**

The Motion should also be denied because there is no factual justification for granting the Motion. PYCO does not have a legitimate need to cross SAW's wye track. PYCO has

---

<sup>1</sup> Contrary to PYCO's argument at page 4 of the Motion, the Board's decision served June 21, 2006 is not a final decision no longer subject to judicial review under the Hobbs Act. The decision served June 21, 2006 is one of a continuing series of decisions by the Board providing for alternative rail service under 49 C.F.R. Part 1146 and 1147. Alternative rail service has been in effect from January 26, 2006 to the present and is continuing. Judicial review of the numerous decisions involving alternative rail service cannot be sought until alternative rail service is finally terminated, either by a petition to terminate or as a result of a decision in the feeder line proceedings.

alternative road access to its cottonseed stockpile. A continuous flow of trucks accesses the stockpile via that route. Clearly, there is no emergency need to cross SAW's tracks.

Reference is made to the attached verified Statement of Mr. Larry D. Wisener, President of SAW, for an explanation of why the Motion has not been factually justified.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Motion should be denied.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO  
P.O. Box 64299  
Lubbock, TX 79464-4299

Replicant

*Thomas F. McFarland*

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204  
(312) 201-9695 fax  
mcfarland@aol.com

Attorney for Replicant

DLF DATE: August 15, 2007

## APPENDIX 1

NO. 2006-535,682**CHOO-CHOO PROPERTIES, INC.**

v.

**PYCO INDUSTRIES, INC.**

§ IN THE 237TH DISTRICT COURT  
 §  
 § OF  
 §  
 § LUBBOCK COUNTY, TEXAS

FILED FOR RECORD  
 DISTRICT CLERK LUBBOCK CO.  
 DEPUTY  
 OCT - 5 AM 11:29  
 L. V. [Signature]

**TEMPORARY INJUNCTION**

**ON THIS DAY CAME ON TO BE CONSIDERED** in the above entitled and numbered cause, the Verified Petition for Temporary Injunction filed by Plaintiff, **CHOO-CHOO PROPERTIES, INC.**, and due notice having been given, Plaintiff appeared by and through its authorized representative and its attorney of record, and the Defendant, **PYCO INDUSTRIES, INC.**, appeared by and through its authorized representative and its attorney of record, and whereupon, the parties advised the court that an agreement had been reached as to the terms of a Temporary Injunction to be entered by the court herein.

The court finds that the parties agreed on July 20, 2006, that **PYCO INDUSTRIES, INC.**, would be allowed, for a period of thirty days, to use the crossing that goes from the east to the west over the wye track located between the west **PYCO** plant and the east **PYCO** storage facility. The parties agree that during that thirty-day period of time, **PYCO** may use the crossing to transport cotton seed across the rail tracks owned by **SOUTH PLAINS SWITCHING, LTD. CO.**, and **CHOO-CHOO PROPERTIES, INC.**, from thirty days from the date that the payment of \$750.00 to **CHOO-CHOO PROPERTIES, INC.**, and the providing of a liability insurance certificate naming **CHOO-CHOO PROPERTIES, INC.**, and **SOUTH PLAINS SWITCHING, LTD. CO.**, as an additional insured for all vehicles that pass over the crossing. The court finds that said documents were delivered to counsel representing **CHOO-CHOO PROPERTIES, INC.**, and **SOUTH PLAINS SWITCHING, LTD. CO.**, on July 20, 2006.

**COPY**



The court further finds that thirty days have elapsed since the date of the delivery of the documents and therefore **CHOO-CHOO PROPERTIES, INC.**, is entitled to a Temporary Injunction in this case.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendant, **PYCO INDUSTRIES, INC.**, its agents, servants or employees, are hereby **ORDERED AND COMMANDED** forthwith to desist and refrain from directly or indirectly, individually or through third parties, from trespassing upon the property of **CHOO-CHOO PROPERTIES, INC.**, and crossing the west end of the "wye" track located between **PYCO INDUSTRIES, INC.**'S plant to the west and **PYCO INDUSTRIES, INC.**'S storage facility to the east, until further order of the court.

**IT IS FURTHER ORDERED** that trial on the merits of this cause is hereby set for the 17<sup>th</sup> day of January, 2007.

The court finds that **CHOO-CHOO PROPERTIES, INC.**, has already deposited the sum of \$5,000.00 with the Registry of the Court in connection with a Bond covering the issuance of a Temporary Restraining Order in this case. The court finds that the \$5,000.00 cash deposit is sufficient Bond for the Temporary Injunction herein and shall serve as the Bond and security for the Temporary Injunction granted by the court herein.

SIGNED this 3 day of October, 2006.

/s/ Sam Medina Judge

JUDGE PRESIDING

## APPENDIX 2

**VERIFIED STATEMENT OF LARRY D. WISENER**

I, Larry D Wisener, as of July 1, 2007 assumed the position of President of SAW. This declaration is being made on behalf of SAW

The reason for me returning to my former position as President is because of operational negotiations with a potential new customer requesting to locate on SAW lines to ship between 500-700 cars per year. As this would involve site locations and track construction, the owner of SAW asked me to return as President and I accepted

This is in response to Robert Lacy declaration of July 31, 2007:

Why is PYCO not using Plant 2 which is a larger, new facility that does exactly the same thing as Plant 1 to store the cottonseed? Why didn't PYCO place the seed pile at Plant 2 where they have direct access? Didn't they learn anything last year when they had a problem? Mr Lacy alludes to a private crossing over SAW's former wye track. To date, PYCO has been unable, even with BNSF assistance, to produce a lease, license or an agreement providing for PYCO's right to cross over the wye tracks

I am the owner of Choo Choo Properties (Choo Choo). Choo Choo is a legally-registered franchise, incorporated in the State of Texas. That can be verified by Mr. Lacy at the State Franchise Board. Mr. Lacy neglects to inform the Board that it was Choo Choo that allowed 30-day crossing of the wye track in 2006.

Mr. Lacy contends that the Board's order dated August 3, 2006 invalidated SAW's deeds prior to May 5, 2006 to Choo Choo. Choo Choo has no common carrier obligation and will

defend its right of ownership and property rights under Texas law against anyone that asserts a false claim against it whether district court, federal court or the supreme court.

Photo #1 is looking west from the east side of the wye track into PYCO's Plant 1. It is apparent that there is a large open-air stockpile of cottonseed within PYCO's Plant 1 west of the wye crossing, as well as east thereof. It would appear that those two cottonseed stockpiles are equally susceptible to decay from heat. Mr. Lacy has misled the Board by not disclosing the existing cottonseed stockpile within the PYCO Plant.

Mr. Lacy's statement that SAW staged an incident is not true. The Board should look at the so-called "investigative" report. Reference is made to the first paragraph of Mr. Howell's statement. As there described PYCO employee M. Adams was headed west in the barricade area and PYCO employee D. Anthony was headed east in the barricade area. The barricaded area was the northernmost lane of the westbound lanes (one lane).

I have contacted the same TxDOT officials that I had called before. They denied making a statement to PYCO that I was hysterical, as stated by Lacy.

SAW adheres to protocol hours with respect to SAW yard use. SAW is not prevented from conducting operations outside of protocol hours on portions of the railroad outside of the SAW Yard tracks. What Mr. Lacy is attempting to do is get this Board to restrict SAW common carrier obligations to the remainder of SAW customers. Operations south of the SAW Yard and east of the SAW Yard in no way can impede WTL's SAW. SAW has received no complaints from WTL on SAW operations.

The barricades are down and Photos #2 and #3 show both entrances (one on the east side of the tracks and one on the west side of the tracks) to PYCO. Photo #5 shows a PYCO truck safely moving cottonseed.

Mr. Lacy's statement that traffic officials may prevent PYCO's use of the street is not substantiated. As long as PYCO obeys basic traffic rules and regulations, there should be no problems.

Photo #4 shows the impossibility of an east bound vehicle in a west bound lane to see when the signal lights are activated, as stated in the Howell report.

Mr. Howell's statement concerning my claim that PYCO's seed trucks almost caused a major accident is accurate. But what Mr. Howell reports in no way reflects the conversations that I had with Mr. Wilson of TXDOT. Mr. Gilbert's report does state one accuracy, where he states that Mr. Wisener refused to permit access over "HIS" crossing. Basically, the Gilbert and Howell reports are ambiguous and misleading to this Board.

PYCO's Motion to prevent "further retaliatory actions" by SAW is akin to the classic unwarranted allegation: "do you still beat your wife?" The Board cannot be called upon to prevent "further" retaliatory actions because there has been no retaliation in the first place, when that term is properly understood. Actions which PYCO and the Board have deemed to be unwarranted retaliation instead have involved the withdrawal of privileges in regard to use of SAW's property which SAW was free to extend to PYCO or not, in SAW's sole discretion.

Thus, PYCO never had a right to operate a trackmobile on SAW's property. SAW had a right to permit such operation or not, without regard to any other business dealings between

SAW and PYCO SAW's withdrawal of PYCO's privilege to operate the trackmobile on SAW's property was a perfectly lawful exercise of SAW's dominion over its property, not an unlawful retaliatory act

Similarly, when the one-year term of SAW's lease of Tract 9298 to PYCO expired, SAW had a right to extend the term of that lease or not, in SAW's sole discretion. SAW's refusal to extend that lease term was a perfectly lawful exercise of SAW's dominion over its property, not unlawful retaliation

Along the same lines, no agreement has ever been produced by PYCO that would give it the right to cross SAW's wye track SAW thus had the right to permit PYCO to cross that track or not, in SAW's sole discretion SAW's withdrawal of PYCO's privilege to cross that track was a perfectly lawful exercise of SAW's dominion over its property, not an unwarranted retaliatory act

The upshot of the foregoing is that SAW was and is entitled by law to make such use of its own property as it sees fit, and that PYCO's allegations of retaliation have been unwarranted from the start

In the Board's decision in Finance Docket No 34802, served June 21, 2006, at 6, the Board referred to a pending request by PYCO to the Texas Department of Transportation (TXDOT) to construct a new road access from PYCO's Plant 1 to PYCO's cottonseed stockpile Subsequent to that Board decision, TXDOT approval was obtained, and the road access became available At present, therefore, PYCO has access to its cottonseed stockpile via a public road

That being the case, PYCO does not have an emergency need to cross SAW's wye track to access that stockpile

PYCO wants the Board to force SAW to relieve PYCO from the effects of PYCO's own inadequate infrastructure. If cottonseed rots in the sun, why doesn't PYCO have indoor storage for its cottonseed? If it is important for there to be unobstructed access between cottonseed supply and rail shipping facilities, why isn't much or all of the PYCO cottonseed supply located at Plant 2, where there is adequate plant acreage on which to locate that supply close to rail shipping facilities? This whole problem started because PYCO lacked sufficient private trackage to accommodate a bumper cotton crop. Now PYCO wants SAW to suffer even more because of inadequate PYCO facilities. The Board should not allow PYCO to get away with that

PYCO's allegation of SAW cars on the wye track in violation of a protocol is very much exaggerated. Cars in SAW's account have been located on that track in WTL's operating window on only one occasion in the more than 12-month period during which the operating protocols have been in effect. That occurred as an operational necessity when BNSF refused to accept SAW's outbound interchange during SAW's operating window. Outbound cars had to be placed on the wye track to leave room to receive the anticipated inbound interchange from WTL. SAW's other tracks were full at the time. Apparently, this single instance did not cause any operational issues for PYCO, no complaint was received by SAW. The outbound interchange was accepted by BNSF during the SAW operating window on the following day.

PYCO has resurrected its repeated contention that I told Mr. Lacy of PYCO that PYCO would have to try to figure out how to take care of itself. That statement was taken out of its

proper context. In so stating to Mr. Lacy, I was advising PYCO that a subsequent purchaser of SAW would be unlikely to continue the favored status that PYCO enjoyed with SAW (trackmobile operation, lease of Track 9298, etc.)

SAW never ceased providing adequate rail service to PYCO. There was never a single instance in which PYCO ordered a car and SAW failed to provide it, nor failed to provide it on a timely basis. When PYCO increased its traffic in 2005, it utilized SAW's infrastructure rather than constructing its own infrastructure to handle the increased volume. PYCO didn't want to build infrastructure, nor to purchase it, nor to pay for the use of it, but instead prevailed upon the Board to take it for them from SAW. Now PYCO wants the Board to do the same in regard to SAW's wye track, for which PYCO does not have an agreement to cross. The Board should refuse to do so.

This Board has not received one additional complaint from a current SAW customer after the form letters (see Weaver Grain letter attached) supplied by counsel for PYCO and signed under pressure (as SAW has learned) from PYCO. None of the letters sent to the Board cited actual incidents of inadequate service but rather expressed a fear that poor service "may occur" at some point in the future. (The Board should be advised that SAW vehemently opposes Alternative Rail Service, Feeder Line Application and the finding of Public Convenience and Necessity). Hanson filed a subsequent complaint and misleads this Board about the necessity for the use of their former lease as they had large aggregate shipments for Lubbock. Hanson has not contacted SAW nor shipped a train for unloading on Hanson's former lease track. SAW contends Hanson and PYCO entered into a conspiracy to harm SAW, decrease its revenues, and

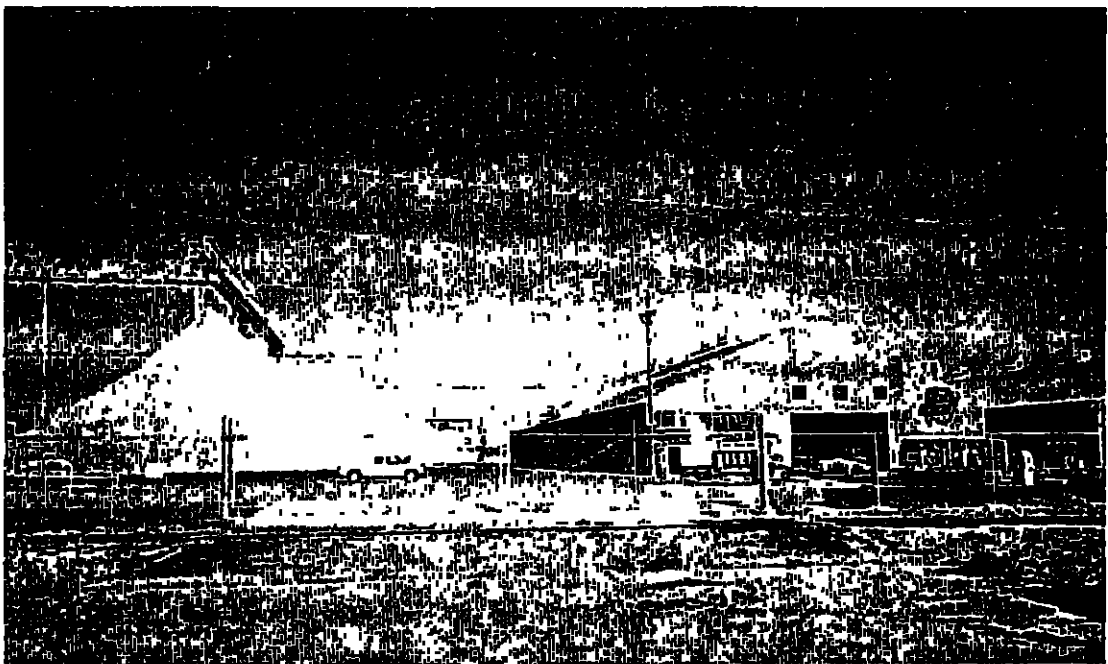


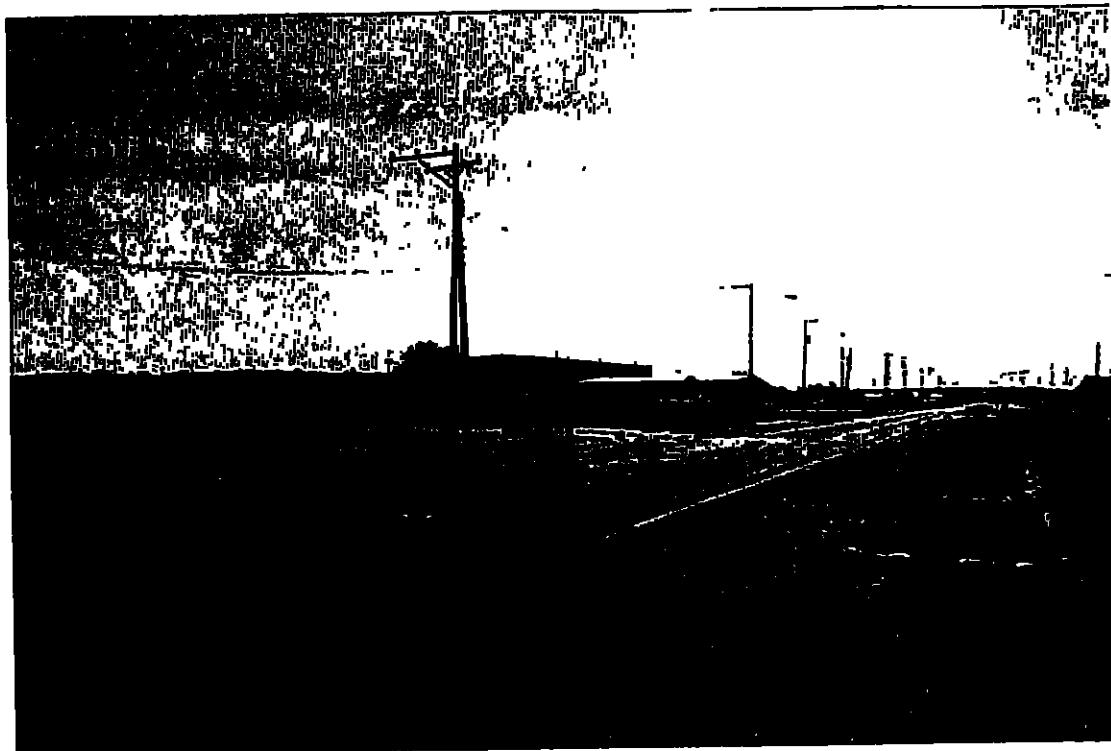
keep out competitors. SAW has received calls from aggregate competitors of Hanson and was unable to accommodate them with an unloading site. SAW has also been unable to utilize the former Hanson track for any purpose.

Mr. Lacy's statement at page 11 that PYCO is rail dependent is belied by the steady stream of trucks that are loaded with cottonseed directly from PYCO's stockpiles, and which deliver that seed to many cattle feedlots in West Texas.

I note that Mr. Lacy stated at page 4 that most of its sales of cottonseed for livestock feed are to Penny Newman Grain Company. SAW has shown that Penny Newman is both consignor and consignee on approximately two-thirds of all rail shipments from PYCO facilities at Lubbock. The Board cannot reasonably take action in regard to those shipments without having been requested to do so by Penny Newman. As the Board knows, Penny Newman is not a party to these proceedings. Penny Newman has not requested that the Board take any action in regard to its shipments.

Photo #1





*Photo #2*

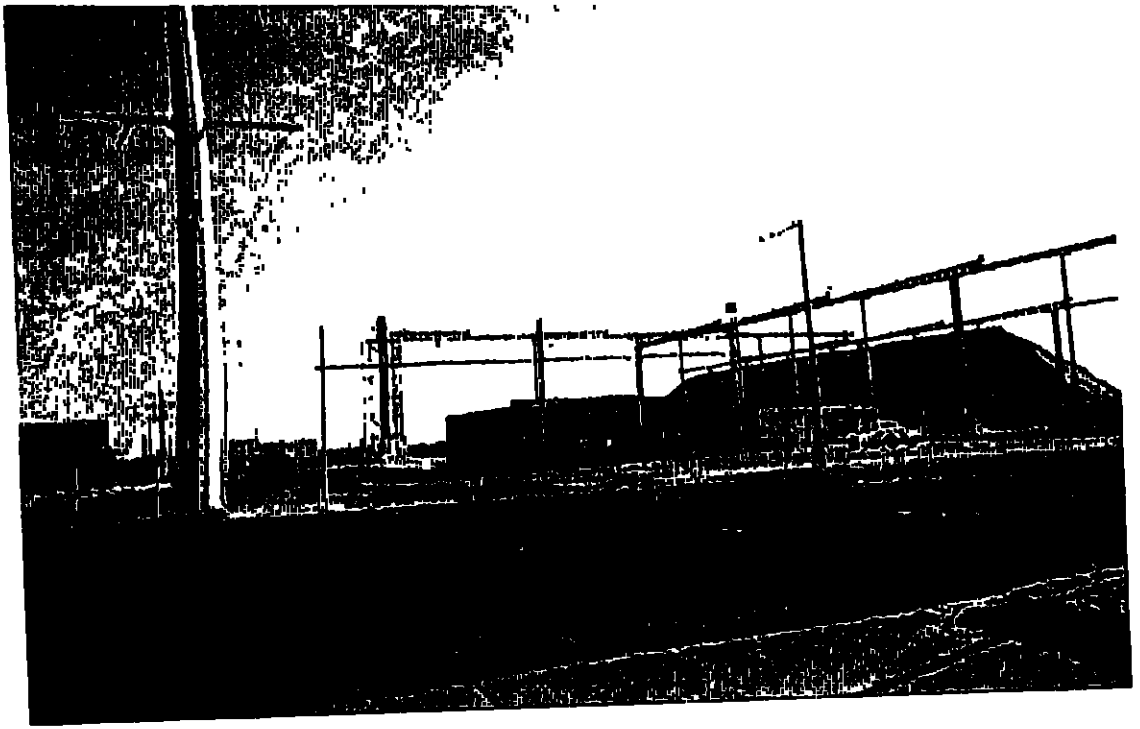


Photo #3



Photo #4

Photo # 5



SENT BY: CHARLES H MONTANGE;

206 546 3739;

AUG-2-06 5:13PM;  
(PHN)744322)

PAGE 41/45  
P.001/084

31 July 2006  
by express service

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: PYCO Industries, Inc. -- Feeder Line Application --  
South Plains Switching, F.D. 34890 and F.D. 34844

Dear Mr. Secretary:

This letter is on behalf of Weyer Grain. Our local rail service is currently provided by South Plains Switching, Ltd (SAW).

PYCO Industries, Inc., originally filed a feeder line application for all of the SAW system, and at least for the portion called Alternative Two (that serving PYCO, Attebury and Compress). In this Board's decision in the above docket dated July 3, 2006, STB allowed the feeder line application to go forward for Alternative Two only, on the ground that a majority of shippers had not filed statements indicating that they believed SAW service was inadequate. In a decision issued July 21, 2006, the Board indicated that Keokuk Junction Railway Company (KJRY) could seek to file a competing application for the entire line.


We concur that service by SAW is no longer adequate or reliable as to ourselves. As PYCO shows in its Feeder Line Application, there are instances in which SAW management has "blown up" at shippers who raise issues with their service, and has threatened retaliation. This has happened to both large shippers (PYCO itself) as well as small shippers (Hi Plains Bag and Bagging). This risk of retaliation renders SAW undependable and inadequate. If anyone is permitted to acquire all SAW lines, it should be PYCO pursuant to its feeder line application. We support PYCO's application, and request that PYCO be permitted to acquire the entire SAW system. We do not believe that KJRY would be a material improvement over SAW and we do not support KJRY's efforts to file a competing application, or its application if filed.

In order to minimize the retaliation against us, we request that this Board act to authorize PYCO's feeder line acquisition as soon as possible, and certainly by October 23, 2006.

Thank you for your assistance in this matter.

SENT BY: CHARLES H MONTANGE; 208 546 8739; AUG-2-88 5:13PM; PAGE 42/45  
RVT-01-2086(106) 13110 PYLO INDUSTRIES (FMA)1687211

Respectfully submitted,

  
\_\_\_\_\_  
title:  
company:  
address:  
tel number:

  
\_\_\_\_\_  
President

Encls. (orig. and 10 to STB)

cc. Thomas McFarland, Esq.  
208 South LaSalle St., Suite 1890  
Chicago, IL 60604-1112  
counsel for SAW

William A. Mullins, Esq.  
Baker & Miller  
2401 Pennsylvania Ave., N.W.  
Washington, D.C. 20037  
counsel for KJRY

Charles H. Montange, Esq.  
426 NW 162d St.  
Seattle, WA 98177  
counsel for PYCO



**"Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."**

Executed on Aug-13-2007

  
Larry D. Wisener

## APPENDIX 3

**VERIFIED STATEMENT OF SHAD WISENER**

My name is Shad Wisener. I am a member of the train crew of South Plains Switching, Ltd Co (SAW) at Lubbock, Texas. I have previously provided sworn testimony in this matter. My current statement relates to the allegedly "staged" incident at SAW's 34<sup>th</sup> Street crossing, referred to at page 4 of the Supplemental Declaration of Robert Lacy filed as part of PYCO's "Emergency Motion" on August 1, 2007

Concerning the incident in 34<sup>th</sup> Street crossing I submit the following. I was indeed on the train headed south toward 34<sup>th</sup> Street and would note that Mr. Les Howell gives perhaps the best indication of the lack of organization and disregard for safety exhibited by PYCO as it pertains to this crossing. PYCO had barricaded the north most westbound lane for its use to transfer cottonseed from its stockpile to its plant. As Mr. Adams was headed west within the barricade area, and Mr. Anthony was headed east within the barricade area, a head-on collision was imminent had the respective trucks not been stopped by warning horns and subsequent sounding of the SAW train. After the train passed the eastbound truck had to back into the PYCO "Globe entrance" in order to allow the west bound truck to enter the plant entrance. There would have been no room for the trucks to pass by each other within the barricade area.

The assertion that SAW did not sound the horn until it had entered the crossing is totally false. The trucks stopped when the SAW did sound the warning horn and the warning signals were activated. The concern for the SAW crew was that it appeared that the west bound truck was perhaps not going to wait on the train and sped up momentarily as if to try to "beat" the

train. Note well that the eastbound truck was moving against the flow of traffic and would have a view of the back of the warning signals.

SAW indeed takes safety very seriously and I personally resent the accusation that we would have contrived an incident that would compromise the safety of anyone, be it SAW personnel, PYCO employees, or the motoring public. The black SUV did indeed dart through the crossing, adding to the potential for an accident. Perhaps that was due to the confusion that the PYCO barrier system created. Perhaps it was due to the PYCO trucks and barricades obstructing the view of the oncoming train. Perhaps due to the caution (slow speed) used by SAW in approaching the crossing. The driver of the SUV felt it safe to proceed. I don't know why it proceeded, just that it did. Fortunately for everyone, there was not an accident. PYCO's subsequent placement of a flagman at the crossing was probably something they should have done to begin with.

One may note as well that the barricading of 34<sup>th</sup> Street was totally unnecessary as the PYCO trucks can enter 34<sup>th</sup> and proceed east to the new entrance to the seed storage area and re-enter 34<sup>th</sup> and proceed west to the "Globe street" entrance without needing to move trucks against the flow of traffic, or reducing the westbound traffic to one lane. To somehow claim this as expensive seems a bit of a stretch. I travel 34<sup>th</sup> Street regularly and have incurred no added expense by doing so.

"Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Executed on 8-13-11

  
Shad Wisener

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2007 I served the foregoing document. Reply In Opposition To Emergency Motion To Prevent Further Retaliatory Actions By South Plains Switching, Ltd. Co Against PYCO Industries, Inc "", by e-mail on the following:

Charles H. Montange, Esq  
426 N.W. 162<sup>nd</sup> Street  
Seattle, WA 98177  
*c.montange@verizon.net*

Gary McLaren, Esq  
Phillips & McLaren  
3305 66<sup>th</sup> Street, Suite 1A  
Lubbock, TX 79413  
*gmclaren@abcglobal.net*

John D. Heffner, Esq  
John D. Heffner, PLLC  
1920 N Street, N.W.  
Suite 800  
Washington, DC 20036  
*j.heffner@verizon.net*

William A. Mullins, Esq  
Baker & Miller, PLLC  
2401 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, DC 20037  
*wmullins@bakerandmiller.com*

Daniel A. LaKemper, Esq  
Pioneer Industrial Railway Co  
1318 S. Johanson Rd  
Peoria, IL 61607  
*lakemper@mtco.com*

William C. Sippel, Esq  
Fletcher & Sippel, LLC  
29 North Wacker Drive  
Suite 920  
Chicago, IL 60606-2875  
*wsippel@fletcher-sippel.com*

Adrian L. Steel, Jr.  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
*asteel@mayerbrownrowe.com*

*Thomas F. McFarland*

---

Thomas F. McFarland